PROGRESS IN LEGISLATION CONCERNING INDUSTRIAL ACCIDENTS

By George W. Anderson,
Boston, Mass.

After years of discussion, the case against our present American method of dealing with industrial accidents is fully made out; the difficulty is to agree upon an adequate and constitutional remedy. In this discussion the representatives of great employers of labor have been among the strongest advocates of remedial legislation. Already many of our great corporations have abandoned the negligence theory as being both unjust and inexpedient. In the large industries, voluntary arrangements between employers and employees have already accomplished much. It still remains, however, to apply the compelling process of the law to the many, particularly to the smaller employers, who still linger haltingly in the old morass of "due care" and "negligence."

Two main questions arise for present consideration:

1st: What may American Legislatures constitutionally do?

2d: Assuming freedom of choice, what is the system to choose?

Of actual remedial legislation there is little. Washington has just adopted a species of state insurance applicable to so-called "hazardous occupations." New Jersey has dealt with the problem by passing an act which takes away from the employers practically every defence known to the common law, providing also an elective compensation scheme, which compensation scheme is presumed to be a part of all contracts of hiring made subsequent to the act, unless the parties in writing otherwise expressly provide. Manifestly, this is an attempt to make subsequent hiring contracts conform to the legislative standard of a proper public policy, without explicitly and absolutely making employers liable for accidents due in no part to their fault. The legislative status in many other states, particularly in Minnesota, Wisconsin and Ohio, makes it probable that there may be further legislation before these notes are in print.

The legislative experience calling for most discussion is that of New York. In that state a very able commission made, in 1910,

a report which is one of the best, if not the very best, documents extant on industrial accidents. The recommendations of the commission, slightly amended, were enacted into law and approved by Governor (now Mr. Justice) Hughes. That law has just been declared unconstitutional by a unanimous opinion of the court of last resort in New York. The grounds of that decision naturally furnish a starting point for discussion of the constitutionality of remedial legislation.

I. *Constitutionality*

The gist of the New York Act was—to make the employer responsible in "intrinsically dangerous industries," except when the victim was guilty of serious and wilful misconduct—adopting in these industries practically the rule of liability of the English Compensation Act. The New York Court of Appeals held that it was within the power of the Legislature to abolish the fellow-servant rule, the assumption-of-risk rule and the contributory-negligence rule; but held it unconstitutional to make the employer liable for an injury for which the employer was in no respect at fault. Chief Justice Cullen said: "I know of no principle on which one can be compelled to indemnify another for loss, unless it is based upon contractural obligation or fault."

At the outset it is worth while to note that a liability act framed exactly in accordance with the opinion of these learned judges would be very nearly as broad in practical operation as the act held unconstitutional. Take away from the employer all these defenses of fellow-servant, assumption-of-risk and contributory-negligence, leave the employee his constitutional right of a jury trial, and the employers of New York will win no cases, except when the employee is guilty of serious and wilful misconduct. It is not a substantive and valuable right of the employer that the Court of Appeals has protected by this decision.

But, with all respect to the learned opinion of this great court of the Empire State, its reasoning does not convince. It is not true, and it never has been true, that the common law does not impose liability without either a contract or a fault. The doctrine, *respondeat superior,* on fair analysis, goes precisely as far as the doctrine underlying the New York legislation. The employer who selects his employee with the greatest care and gives him the most

explicit directions as to the conduct of his business, is not guilty of "fault" when that employee, in utter disregard of the directions, negligently injures a stranger. The liability of that employer to the stranger is based neither "on contractual obligation" nor on "fault"; rather is it, as Chief Justice Shaw said in the Farwell case,[1] "The maxim *respondeat superior* is adopted in that case from general considerations of policy and security." A fault is the doing of something that one ought not to do, or the omitting to do something that one ought to do. The employer in the case stated is guilty of no sin of omission or commission. The only thing he has done which he might omit to do, is to employ. Society says: "From general principles of policy and security we will hold the employer liable for the employee's torts within the scope of the employment." The New York court brushes aside this general welfare principle by saying slightingly, "The whole theory is expressed in the maxim, *'Qui facit per alium, facit per se.'* " It was Mr. Birrell, I think, who somewhere says, in substance, that lawyers, when sense and logic fail, resort to Latin maxims. His jibe is pertinent.

The laws of most of our states make a man liable to support not only his wife and his child, but his father and his grandfather.[2] Doubtless one might be held "to blame" for having a wife or a child, but it is not a fault to have a father or a grandfather; yet society takes our property to support our parents and grandparents.

If our constitution asserts a really logical individualism, a large share of our taxation is unconstitutional. At bottom there is no justification for taxing us to support the insane, the idle, the vicious, the unfortunate of all classes, except that the general welfare of society demands it, except that our public policy asserts that society owes every man, however useless or vicious, a living. No protectionist certainly can be heard to argue that the power of taxation may not be used for a purpose private as well as public, justifying it upon the theory that private profit is public advantage.

The New York court seems to have overlooked what is really the gist of the question. Somebody must bear the burden of the industrial accidents which are found to be an inevitable incident of modern industry. Manifestly, it is just that that burden should be thrown upon the consumer in the price of the product. Putting the

[1] 4 Metcalf, 56.

[2] Compare Revised Laws, Mass. c. 81, sec. 10.

liability upon the employer is nothing but a means, and apparently the most direct and efficient means, of making the price of the product include the cost (or a part of it) of the waste of the human tools necessarily employed in that production. The decision of the New York court is, therefore, that the legislature cannot, at least in the method adopted, make these hazardous industries self-supporting.

The New York court dissents from the doctrine of the Supreme Court of the United States in Noble State Bank vs. Haskell, 219 U. S. 104, in which, in an opinion recently written by Mr. Justice Holmes, that court unanimously held that the Oklahoma statute requiring compulsory insurance among state banks was constitutional.

Coming at this time, this decision of the Supreme Court of the United States is profoundly significant. The opinion is, perhaps, even more significant than the decision. The question was whether the Oklahoma statute, requiring the state banks to contribute to a depositors' guaranty fund, was depriving the solvent banks of their property without due process of law. It is obvious that such a law may, and indeed is intended to, require the solvent banks to pay, *pro tanto,* the debts of the insolvent banks. The law could doubtless have been supported as nothing but an amendment to the charters of the banks. But the court did not, in its opinion, put it upon that narrow ground. Rather did the court seem to take pains to assert a broader doctrine as to the limits of legislative power under the general welfare, or police power, clauses, than has ever before been asserted by the Supreme Court of the United States, and perhaps by any court of last resort in this country. Mr. Justice Holmes says, "We must be cautious about pressing the broad words of the Fourteenth Amendment to a dryly logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power."

. . . . "Nevertheless, notwithstanding the logical form of the objection, *there are more powerful considerations on the other side.* In the first place, it is established by a series of cases that an *ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use.*" . . . *"And in the next, it would seem that there may be other cases beside the every-day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."* . . . . *"At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said. It may be said in a general way that the police power extends to all the great public needs.* (Canfield *vs.* United States, 167 U. S. 518, 42 L. Ed. 260, 17 Sup. Ct. Rep. 864.) It may be put *forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.* Among matters of that sort probably few would doubt that both usage and *preponderant opinion give their sanction to enforcing the primary conditions of successful commerce.*" (Italics mine.)

Of this opinion, and of two other recent similar decisions by the Supreme Court of the United States, the New York court said, "We cannot recognize them as controlling of our construction of our own constitution. . . . . All that it is necessary to affirm in the case before us is that in our view of the constitution of our state, the liability sought to be imposed upon employers enumerated in the statute before us is a taking of property without due process of law, and the statute is, therefore, void." This is a plain declaration that the New York Court of Appeals, as now constituted, will not sustain as constitutional such legislation as the Supreme Court of the United States holds valid.

The position now taken by the Supreme Court of the United States, as now constituted, is the more significant when one considers certain historical incidents, and particularly the historical incident of the attitude of Mr. Justice Holmes on the proper dividing line between legislative powers and judicial powers, as shown by his opinions for twenty years.

In 1891, the Supreme Judicial Court of Massachusetts held unconstitutional the Weavers' Fine Bill, prohibiting the imposing of

fines as a penalty for alleged imperfect weaving. No other case in Massachusetts slants so strongly towards the fashionable modern doctrine of giving to our courts of last resort a veto power on legislation which has passed both legislative bodies and been approved by the executive, thus making our courts, in effect, a fourth legislative body. In his dissenting opinion, Mr. Justice Holmes took strong grounds against any such assumption of power by the courts. He said, "So far as has been pointed out to me, I do not see that it interferes with the right of acquiring, possessing and protecting property any more than the laws against usury or gaming. In truth, I do not think that that clause of the Bill of Rights has any application. It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the constitution is correct, and that, speaking as a political economist, I should agree in condemning the law, *still I should not be willing or think myself authorized to overturn legislation on that ground, unless I thought that an honest difference of opinion was impossible, or pretty nearly so.*" . . . . *"I cannot pronounce the legislation void as based on a false assumption, since I know nothing about the matter one way or the other.*" (Italics mine.)

One of the most noteworthy of these minority opinions is his dissent in the New York bake-shop case,[3] in which, inter alia, he said, "This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But *I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.* It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient samples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered

[3]Lochner *vs.* N. Y., 198 U. S., 45, 74.

with by school laws, by the post-office law, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts Vaccination law. (Jacobson *vs.* Massachusetts, 197 U. S. 11.) United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. (Northern Securities Co. *vs.* United States, 193 U. S. 197.) Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. (Otis *vs.* Parker, 187 U. S. 606.) The decision sustaining an eight-hour law for miners is still recent. (Holden *vs.* Hardy, 169 U. S. 366.) Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

The simple truth is that the Supreme Court of the United States has in some cases, and the courts of last resort of some of the states have in rather numerous cases—been sitting as American "Houses of Lords," reviewing, and frequently vetoing, legislation which the more representative bodies have enacted.

In the New York bake-shop, the Supreme Court of the United States held, by a bare majority, that it was unconstitutional to prohibit men from working over ten hours a day in the bake-shops of New York. In the Oregon case[4] the same court unanimously held that it was constitutional for the Oregon Legislature to prohibit women from working in certain factories more than ten hours a day. This amounted to saying that in the New York case the Supreme Court thought that it was sound public policy to permit men to work more than ten hours a day, and in the Oregon case that it was sound public policy not to permit women to work more than ten hours a day. But this is a pure question of legislative fact, to be determined by the legislature, and in no proper sense a judicial or constitutional question at all.

[4]Muller *vs.* Oregon, 208 U. S. 411.

Our courts of last resort have always held restrictions upon contracts to be constitutional if they approved of the restrictions. They have strongly tended to hold them unconstitutional if they disapproved of the restrictions. Whenever what are sometimes called the "moral forces" of the country demand a certain kind of legislation; for instance, the restriction of the liquor traffic, the prohibition of lotteries and various other forms of gambling, the courts have had little difficulty in holding such restrictions valid. The difficulty with legislation for workmen's compensation is that a large share of our judges have utterly failed to grasp the economic and industrial facts underlying the problem, and therefore tend to arrogate to themselves legislative functions which do not belong to them. The fundamental difficulty is that the courts have usurped legislative functions. The true rule is, as stated by Mr. Justice Holmes, "Where there is, or generally is believed to be, an important ground of public policy for restraint, the constitution does not forbid it, whether this court agrees or disagrees with the policy pursued." [5]

As a historical fact, the founders of our government probably never intended to subordinate the executive and legislative branches of our government to the judicial, by permitting the judiciary to nullify the acts of the legislature or of the executive as unconstitutional. But, assuming that it is now the settled American policy that the judiciary is the constitution-enforcing power, it will never be the American policy that the judiciary shall determine legislative questions turning upon questions of fact as to which the court is often entirely ignorant, and which it has no proper means of bringing before it.

Mr. Brandeis won the Oregon ten-hour-law case because he put before the Supreme Court evidence in the form of a brief bearing upon industrial, physiological and economic conditions as to women, eminently fit to be put before a legislative committee, but, in proper perspective, having no rightful place in the argument of a constitutional question before the greatest court on earth.

No one has been more sensitive to this increasing encroachment of the judiciary upon the legislative branch than have some of our judges. It can be no mere accident that this opinion of the Supreme Court of the United States in the Oklahoma case, coming shortly after its substantial reorganization, has laid a broader and deeper

[5] Adair *vs.* United States, 208 U. S. 161, at 191.

foundation for the general welfare power than has been hitherto thought to exist. It is impossible to escape the conviction that the Supreme Court of the United States would easily have held constitutional the statute that the New York Court of Appeals has declared unconstitutional.

In Massachusetts, on the whole, the tendency of the courts has been not to exaggerate their power of overturning deliberate and important acts of the legislature as unconstitutional. Yet, even in Massachusetts, an eminent attorney general had occasion to point out in his annual report as early as 1894, that, "Within the last four years more statutes have been declared unconstitutional than in the first seventy years under the constitution," and to set forth in the same report the following:

"The legislature cannot be unmindful of its own responsibility to guard against unconstitutional enactments; a responsibility which cannot be devolved upon the judiciary and ought not to be shared with it. On the other hand, an eminent judge long ago said, foreseeing the absolute importance of preserving the right equipoise of power between the different departments of the government, 'The interference of the judiciary with legislative acts, if frequent or on dubious grounds, might occasion so great a jealousy of this power and so general a prejudice against it as to lead to measures ending in the total overthrow of the independence of the judges, and so of the best preservative of the Constitution. The validity of a law ought not, then, to be questioned unless it is so obviously repugnant to the Constitution that when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy. By such a cautious exercise of this judicial check, no jealousy of it will be excited, the public confidence in it will be promoted, and its salutary effects be justly and fully appreciated.'"

Recent decisions of the Massachusetts court do not indicate that that court as now constituted will easily or carelessly hold legislation unconstitutional; rather the contrary, as shown by a recent decision limiting the assignment of wages without the written assent of the employer and, if the employee was married, without the written assent of his wife—thus establishing, arguably at least, a double guardianship over the employee. But our court, in an opinion written by the present Chief Justice,[6] held that the statute was within the constitutional power of the legislature, as the legislature "might adopt this form of regulation as salutary in its application to most members of the class with which they were dealing."

[6]Mutual Loan Co. *vs.* Martell, 200 Mass. 482.

The form that remedial legislation for industrial accidents shall ultimately take must be determined by the sound public opinion of the American people, and not by the "drily logical" reasoning processes of certain learned judges, many of whom know more of the contents of the Year Books than they do of the conditions of modern industry. Doubtless certain courts will continue to attempt to sit as Houses of Lords, but in the long run these attempts will be failures. It should be assumed that our constitutions, national and state, do not limit honest and intelligent attempts to deal with this great economic and social evil.

Nothing worth while will be accomplished if American legislatures do not assume their proper responsibility in determining the proper American policy in dealing with industrial accidents. It is profoundly important that our legislatures should assert their paramount right to determine finally all questions which are in truth legislative and not judicial.

II. *The Form of the Remedy*

Second. The Form of the Remedy:

Broadly speaking, proposed legislation in America follows one of two models:

(a) The English model, which is in effect an extended Employers' Liability Act.

(b) The German model, which deals with industrial accidents as one of the inevitable risks of life and requiring compulsory insurance.

(*a*) Naturally, and for good reasons if the principle is sound, the tendency in America is to follow the English model. But it will be unfortunate if we do follow that model in dealing with industrial accidents. The English act has, broadly speaking, not been a success. This is not saying that the English Compensation Act has not created conditions better than formerly existed, and far better than those which now exist in America. It is saying that that Act is based in large part upon a wrong principle, and is less successful than the German act.

The English, like ourselves, are obsessed with theories of individualism utterly unadapted to modern conditions. In fact, our modern conditions are those of feudalism. This is not the place to elaborate the comparison, but most careful observers recognize that

the modern factory system is as feudalistic as the mediaeval land-holding system: the few are placed in positions of power where they may, and do, control the conditions and means of livelihood of the many. Our competitive "freedom" is not a freedom which enables the many to determine their conditions of labor or to insure to themselves their fair proportion of the product.

But when the English, in the late 70's, recognized the ghastly injustice of the common law in dealing with industrial accidents, they refused to recognize that the risk of industrial accidents was one of several risks that the employee does not, and cannot, guard himself against; the other risks—equally destructive of wholesome and happy living—being the risks of sickness, of early death, and of a non-productive old age. Their Employers' Liability Act of 1880 simply took away from the employer some of the defenses that judge-made law had created for the employers' benefit. It was a failure. Mr. Chamberlain said it should be called the Lawyers' Employment Act.

In 1897 their Compensation Act took away from the employers all defenses except that the accident was caused by the wilful and serious misconduct of the injured employee. But neither the Compensation Act of 1897 nor its subsequent amendments in 1900 and 1906 provided any insurance scheme for pro-rating and equalizing the losses accruing from industrial accidents, either among the employers or between the employers and the employees. It assumed that employers whose business interests were not large enough to enable them to carry their own risks, would secure themselves, and indirectly their possibly injured employees, by obtaining insurance from the private liability companies which had come into existence after the passage of the Employers' Liability Act of 1880. The result is that in England substantially all the small employers now insure in these private liability companies engaged in this ghastly traffic in life and limb purely for profit. The accident business never has been, and never can be, properly administered by an outside company intervening between employer and employee and finding its profit in preventing the victims from obtaining any (or adequate) relief. The insurance adjuster is the correlative of the ambulance chaser; both are, viewed in proper perspective, parasites—creators of strife and inhumanity; both should be eliminated before industrial accidents can be humanely and economically dealt with.

The English Compensation Act has not decreased litigation—it has increased it. It has not, so far as can be ascertained, tended to decrease the number of accidents; except in rare cases, the employer paying a flat rate for his insurance gives no more attention than formerly to safety devices; the companies, being engaged as they are in a somewhat violent competition for patronage, dare not —and do not—enforce safe-guarding methods and devices.

Nor is the English Compensation Act in any way correlated with the widespread and benevolent work of the Friendly Societies and other voluntary organizations paying benefits to injured or otherwise disabled workmen. The English have already legislated with relation to old-age pensions, and are struggling with non-employment, a far more difficult question. But their legislation has been, broadly speaking, patch-work; and patch-work mainly because they refused to face the facts that the great multitude of their people are living under a wage system which leaves them, as individuals, no margin to provide against the risks of accident, sickness, early death or unproductive old age.

Some one has said that the essential difference between the English mind (and ours is the English mind) and the German mind, is that the German mind ascertains facts and, having ascertained them, respects them; that the English mind cares only for theories; if the facts do not accord, so much the worse for the facts.

(*b*) The Germans in the early 80's faced, they did not blink at, the facts of our industrial organization, and provided for industrial accidents simply as a part of a general scheme of workmen's insurance. There is no other logical, efficient and proper way with which to deal with it. So dealt with, the difficulties are great enough; and no perfect system has yet been devised in Germany. But it is beyond question that to-day Germany has the most efficient and the most humane industrial system of any of the great nations. The relations between employer and employee have been improved. The number of the permanently injured has been diminished. The tendency is almost certainly to a diminution of the number of accidents. But the important thing is that their system is upon a proper logical and industrial basis. It deals with the problem of industrial accidents as an insurance problem and not as a fault problem. It recognizes that accidents, whether due to the employer's fault, employee's fault, the risks of the business or a combination of causes

known and unknown, are certain to happen, and that their happening is an event of social importance, not a mere individual misfortune. It deals with these risks of life, just as the Germans and ourselves have dealt with education, as a great social need. It recognizes that even if the employees could, as they cannot, be made to see the desirability of insurance, that the cost of solicitation in the absence of compulsion would throw an intolerable burden upon the working classes even if otherwise, and there are a few hopeful precedents, we could get insurance companies economically organized and managed; that the cheapest and most efficient insurance solicitor is the "Thou shalt" of the law.

The state must recognize that insurance is as much a necessity for social welfare as education is a necessity. It is a matter of detail whether the employer shall be compelled to insure his employee against some or all of the accidents arising out of the employment, or whether the employee be compelled to insure himself. The important thing is to cut loose once and for all from the theory that accidents are to be dealt with solely upon the basis of the fault of either employer or employee, or the fault of both.

The theory of individualism is that each person should take care of himself, and that society will profit out of his so caring for himself. The theory fails. The sound theory of "collectivism," or whatever one chooses to call it, is that, within certain proper limits, the mass of the people must be compelled to take care of themselves, by co-operating, so as to equalize and pro-rate risks which, borne where they fall, work destruction, cause barbarism, are intolerable; but which, pro-rated and equalized by a proper insurance system, constitute a burden easily carried.